

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Applications of Ameritech Corp., Transferor,)	CC Docket No. 98-141
And SBC Communications, Transferee,)	
For Consent to Transfer Control of)	ASD File No. 99-49
Corporations Holding Commission)	
Licenses and Lines)	
)	

**REPLY OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits this reply to the comments filed in response to CompTel's Petition for Reconsideration of the Commission's *Pronto Modification Order*.¹ Tellingly, all of the entities that must rely on the conditions adopted in the *Pronto Modification Order* support reconsideration to clarify or modify key aspects of the legal and operational relationship between the SBC ILECs and their advanced services affiliates. Only SBC is content to leave the conditions ambiguous and subject to later litigation and dispute. If the conditions are to have the public interest benefits anticipated in the *Pronto Modification Order*, the Commission must grant CompTel's Petition for Reconsideration.

¹ Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding commission Licenses and Lines, *Second Memorandum Opinion and Order*, FCC 00-336 (rel. Sept. 8, 2000); see *Public Notice*, DA 00-2367 (rel. Oct. 19, 2000) (requesting comment on CompTel's Petition).

I. **THE CARRIERS THAT MUST RELY ON THE PRONTO CONDITIONS SUPPORT RECONSIDERATION SO THAT THE CONDITIONS CAN ACHIEVE THEIR DESIRED EFFECT**

In the *Pronto Modification* Order, the Commission concluded that the SBC ILECs' ownership of certain advanced services equipment would be in the public interest, "so long as SBC takes the actions described in this Order to ensure that competitors have the ability to compete effectively in the advanced services marketplace."² A number of the CLECs planning to rely on SBC's Pronto architecture – and the conditions adopted by the Commission – to provide competing advanced services submitted comments on CompTel's petition. Their comments confirm CompTel's contention that the Commission must clarify and explain key aspects of SBC's obligations in order to provide CLECs with meaningful assurances of nondiscriminatory access.

A. **The Commission Should Confirm that the "Broadband Offering" is Fully Subject to UNE Obligations and that Line Splitting Must be Made Available to all CLECs**

The Commission cannot continue to duck the question of whether SBC's advanced services affiliate is purchasing UNEs from SBC. Failure to confirm that SBC's "Broadband Offering" is in fact a voluntary combination of UNEs deprives CLECs of the avenues necessary to hold SBC to its promises of nondiscriminatory access to the NGDLC architecture. Moreover, as the CLECs' experiences since adoption of the Order demonstrate, only by declaring that the arrangement between SBC and its affiliate is a UNE arrangement can the Commission give CLECs, SBC and all interested parties the means to quickly identify and resolve disputes over SBC's obligations.

² *Pronto Modification Order*, ¶ 1.

The need for this clarification is acute. As several CLECs have noted, SBC is already backing away from the commitments described in the Order. SBC's proposed contract language limits CLECs' abilities to offer value added services on the subloop, and requires all service and maintenance for the customer to be coordinated with SBC.³ In addition, SBC continues to limit the Quality of Service ("QoS") options available to CLECs using the Pronto architecture.⁴ These problems are compounded by SBC's refusal to incorporate these terms in an interconnection agreement, insisting instead that CLECs negotiate a stand alone "service agreement."⁵ SBC has steadfastly refused to identify how a CLEC could resolve non-pricing issues relating to the "service agreement."⁶

Clarification that SBC's offering is subject to Sections 251 and 252 will facilitate the resolution of these disputes. It will provide a standard against which to judge the sufficiency of SBC's offering – providing the "meat" on the bare "bones" of SBC's voluntary commitments. An ILEC's duties under Section 251 have been interpreted in a number of orders since 1996, and confirmation that SBC's offering is subject to those requirements will provide all parties with additional certainty as to their rights and obligations. Further, it will provide needed clarity concerning the process that all parties may use to resolve any disputes. By declaring that SBC's offering is subject to UNE requirements, there will be no need to worry about SBC seeking to

³ Focal Comments at 3.

⁴ Allegiance Comments at 5.

⁵ *Id.*; see also IP Communications Comments at 4-5 (SBC contends the service could be revoked at any time).

⁶ See Advanced Telecom Group Comments at 2 (SBC could not identify any means other than "consultation" with SBC to address non-pricing disputes).

withdraw its consent to state arbitrations⁷ or whether antitrust lawsuits or other litigation will be sufficient.⁸

Moreover, the Commission's refusal to address the UNE issue creates uncertainty for carriers attempting to provide voice and data services utilizing UNE-P. As CompTel explained in its Petition for Reconsideration, the FCC's non-answer in the Pronto proceeding is inconsistent with the Commission's *Texas 271 Order* and the Commission's prior statements regarding an ILEC's line splitting obligations.⁹ As AT&T notes, this problem resolves itself if the Commission confirms that the Project Pronto loop configuration is subject to the Commission's UNE rules.¹⁰

SBC weakly pleads that the Commission should not "reach out to create new UNEs" in the context of its waiver request.¹¹ But the Commission need not create new UNEs to grant the relief CompTel requests. The Commission has already defined an ILECs' obligations to provide loops, subloops, multiplexing, and access to NGDLC equipment in its *UNE Remand Order*. These *existing* UNE rules provide the basis for the conclusion that SBC is in fact voluntarily combining network elements for its advanced service affiliate. Thus, SBC's claim that the Commission failed to conduct an impairment analysis (SBC Opposition at 5) misses the mark. CompTel seeks only a declaration that the arrangement is a combination of UNEs under

⁷ Focal Comments at 4.

⁸ IP Communications Comments at 8-9.

⁹ CompTel Petition at 5-6.

¹⁰ AT&T Comments at 2. AT&T states that it believes the Pronto architecture satisfies the Commission's definition of a UNE loop as well as a combination of network elements. Although CompTel has no objection to defining SBC's offering as a loop UNE, the Commission need not address this issue if it agrees that the offering constitutes a voluntary combination of network elements.

¹¹ SBC Opposition at 5.

these rules, not the creation of a new network element.¹² There is no question that the Commission is well within its discretion to make such a determination in the context of a waiver request.¹³ In fact, SBC is the one that has forced the FCC to confront the issue here, by pressing forward with its radical redesign without obtaining CLEC input or allowing the Commission to fully consider the architecture in a rulemaking proceeding.

Failing to defeat CompTel's arguments on the merits, SBC cloaks itself in procedural garb to claim that the Commission should reject the Petition because it allegedly has "considered and rejected" CompTel's arguments and no new facts or circumstances have been presented. Yet, SBC concedes that the Commission "took no position" on whether Sections 251 and 252 apply, which is precisely the question CompTel asks the Commission to address on reconsideration. Having failed to address the arguments the first time, the Commission cannot complain that its consideration of them now would be repetitious. Indeed, the Commission has an obligation to fully consider the record before it; the failure to consider –or even address— substantial arguments presented in the record is the hallmark of arbitrary and capricious decisionmaking.¹⁴ Moreover, the comments address several new developments since the *Pronto Modification Order*, developments which confirm the fears raised by CompTel in its earlier

¹² Furthermore, SBC's broadband offering clearly is not a telecommunications "service" as SBC claims. The offering is not tariffed, is not offered to the public, and does not have any of the characteristics commonly associated with retail services. It does, on the other hand, have the characteristics associated with a network element, or a combination of network elements.

¹³ Administrative agencies have broad discretion to choose whether to proceed by rulemaking or by case-by-case adjudication when making policy. *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985); see *1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 00-235, at ¶ 39 (rel. July 12, 2000).

¹⁴ *Motor Vehicles Mfr's Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983); cf. *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (reversing attempted "administrative law shell game" to postpone judicial review).

filings.¹⁵ Without clarification of the legal and operational relationship between SBC and its advanced services affiliate, SBC will take advantage of the ambiguities to deprive CLECs of nondiscriminatory access to its NGDLC equipment. Under these circumstances, the Commission's attempt to postpone a determination as to the UNE status of SBC's proposal is unwise and untenable. The Commission should address this critical question now, while the issue is before it, and while the determination can have the maximum impact on CLECs' use of SBC's proposed architecture.

B. The Commission Should Grant CompTel's Other Reconsideration Requests

Several parties supported CompTel's request for a mandatory transition period for SBC to comply with the Commission's order.¹⁶ SBC, however, misinterprets the purpose of such a transition period. CompTel does not seek to delay SBC's provision of advanced services through its affiliate. Rather, it seeks to ensure that SBC's advanced services affiliate and unaffiliated CLECs "take delivery" of the Pronto network at the same time, and on equal terms. SBC's commitments contain promises to develop new interconnection offerings -- notably, an ability to provide voice and data services over the architecture--within 90 days from the *Pronto Modification Order*. The mandatory transition period puts SBC to the test on that assertion. SBC's affiliate should not benefit from the Pronto architecture until SBC has demonstrated that it has delivered on its promises to provide *all* CLECs meaningful access to its network.

¹⁵ Thus, SBC is wrong in claiming that the Commission does not have new facts or circumstances before it.

¹⁶ See, e.g., Advanced Telecom Group Comments at 7-9 (noting the SBC already has ordered improperly sized RTs "through 2004"); Focal Comments at 5; Allegiance Comments at 6-7.

Finally, SBC makes little attempt to justify its provision of network planning and engineering functions on behalf of its advanced services affiliate. Of course, given the independent auditor's recent finding that SBC performed these functions, it could hardly deny performing them.¹⁷ Instead, SBC claims that its activities were permissible under the Merger Conditions. Apparently, SBC believes that the advanced services affiliate need only design "finished services" while SBC's ILECs may perform a massive redesign of the network to accommodate ASI's DSL deployment plans.¹⁸ This interpretation does not square with the purpose of the Merger Conditions. The network planning and design exception permitted SBC to provide these services only in order to ensure that existing advanced services customers did not experience an interruption of service caused by the transition. SBC's Project Pronto planning activities far exceeded this limited scope. Indeed, after CompTel filed its Petition, the Commission's Deputy Bureau Chief of the Common Carrier Bureau confirmed that SBC's expansive interpretations of the "network planning" provisions of the Merger Conditions were incorrect.¹⁹ Because the Commission's rejection of CompTel's arguments in the *Pronto Modification Order* appear to hinge on an interpretation that conflicts with the interpretation the Commission has advanced elsewhere, CompTel urges the Commission to grant reconsideration on this point.

¹⁷ See Ernst & Young, Report of Independent Accountants on Applying Agreed-Up Procedures, August 31, 2000.

¹⁸ See SBC Opposition at 11.

¹⁹ Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, FCC, to Cassandra Carr, SBC Communications, DA 00-2340 (rel. Oct. 16, 2000).

CONCLUSION

For the foregoing reasons, and for the reasons explained in CompTel's Petition, the Commission should grant reconsideration of the *Pronto Modification Order* in the respects requested.

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